

JAN 29 2007

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH JOHN ARCAND,

Defendant - Appellant.

No. 06-30124

D.C. No. CR-05-00088-2-SEH

MEMORANDUM^{*}

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BOBBI JO WING,

Defendant - Appellant.

No. 06-30133

D.C. No. CR-05-00088-1-SEH

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted December 6, 2006
Portland, Oregon

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: FARRIS, CLIFTON, and BEA, Circuit Judges.

Pathetic events led to a fire, a death, and the conviction of Bobbi Jo Wing and Kenneth Arcand for first-degree murder. There is no legal basis for overturning Appellants' convictions.

Appellants argue that the district court improperly implied it possessed discretion in sentencing by instructing the jury that “punishment . . . is for the court to decide.” The judge, however, added “You may not consider punishment in deciding whether the government has proved its case against a Defendant beyond a reasonable doubt.” When read as a whole, the instruction properly distinguishes the fact-finding role of the jury from the sentencing role of the court, and does not make the implication suggested by Appellants.

Appellants argue the district court had the power and obligation to depart downward from the statutory minimum sentence of life imprisonment. Under *United States v. LaFleur*, however, the district court had no authority to depart downward from the statutory minimum of life imprisonment for first-degree murder. *See LaFleur*, 971 F.2d 200, 208 (9th Cir. 1991). Nor did the district court have authority to depart downward under *United States v. Booker*, 543 U.S. 220 (2005). *Booker* does not apply to statutory minimum sentences. *See United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005).

Appellants' life sentences are not unconstitutionally cruel and unusual under the Eighth Amendment. We have previously upheld life imprisonment for first-degree felony-murder against Eighth Amendment challenges. *See Guam v. Sablan*, 584 F.2d 340, 341 (9th Cir. 1978).

Appellants argue the evidence was insufficient to convict because the Government's case rested almost entirely on Appellants' retracted confessions. The jury, however, may rely on retracted confessions to convict. Moreover, the Government introduced sufficient evidence to corroborate Appellants' confessions. The State Fire Marshal testified for the Government that the fire had burned longest in the living room and carport, the two places where Appellants confessed to starting the fire.

Appellants argue the district court erred by excluding evidence of a previous instance in which Wing's mother, Hannah, set a fire in a relative's yard. Appellants contend this "prior bad act" evidence was relevant under Fed. R. Evid. 404(b) to show that Hannah, not the Appellants, committed the arson at issue in this case.

"Prior bad act" evidence offered to prove identity, however, must be sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue. *United States v. Luna*, 21 F.3d 874, 878-79

(9th Cir. 1994). Here, the prior bad act was a small fire in a front yard, while the arson at issue was a massive fire inside a house. Moreover, there was no evidence the two fires were started in the same manner.

Appellants argue the district court erred by limiting direct examination as to Wing's state of mind shortly before she confessed to the crime. The first prohibited question, relating to one of the investigating FBI Agents' Indian ancestry, was properly excluded. It had little relevance to Wing's state of mind and presented a danger of injecting racial prejudice into the proceedings.

The other two prohibited questions by defense counsel asked Appellant Wing how she felt shortly before she confessed. Despite prohibiting these open-ended questions, Wing was allowed to testify that she falsely confessed to spare her family. The district court, therefore, was within its discretion to exclude such evidence. *See* Fed. R. Evid. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by considerations about the needless presentation of cumulative evidence).

AFFIRMED.